

Supplemental Letter of Findings: 09-0224
Utility Receipts Tax
For the Years 2005, 2006, and 2007

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ISSUES

I. "Late Payment" Revenue – Utility Receipts Tax.

Authority: IC § 6-2.3-1-4; IC § 6-2.3-2-1; IC § 6-8.1-5-1(c).

Taxpayer argues that the "late payment" fees it received from its customers were not subject to the Utility Receipts Tax.

II. Underpayment Penalty.

Authority: IC § 6-2.3-6-1; IC § 6-2.3-6-1(f); IC § 6-8.1-10-2.1(b); I.R.C. § 6654; I.R.C. § 6655.

Taxpayer maintains that it reasonably estimated the amount of Utility Receipts Tax owed Indiana and that the underpayment penalty was wrongly applied.

STATEMENT OF FACTS

Taxpayer is a telephone company co-op which provides telephone, digital television, and Internet services to residents of several Indiana communities. The Department of Revenue (Department) conducted an audit review of taxpayer's tax returns and business records. As a result of the audit review, the Department assessed additional Utility Receipts Tax. Taxpayer objected to the audit results and submitted a protest to that effect. A Letter of Findings (LOF) was issued sustaining taxpayer's objections in part and denying the remaining objections. Taxpayer disagreed with certain of the findings contained within the LOF and requested a rehearing. The Department agreed to revisit two of the remaining disputed issues, an administrative hearing was conducted, and this Supplemental Letter of Findings results.

I. Late Payment Revenue – Utility Receipts Tax.

DISCUSSION

Taxpayer objects to the imposition of Utility Receipts Tax on the "late payment" fees received from its customers.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing Utility Receipts Tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

The URT is imposed by IC § 6-2.3-2-1 as follows:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

(1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana....

"Gross receipts" for purposes of the Indiana's URT is defined at IC § 6-2.3-1-4 as follows:

"Gross receipts" refers to anything of value, including cash or other tangible or intangible property that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services. (Emphasis added).

In summary, the URT is an income tax imposed on receipts from the retail sales of utility services for consumption by the purchaser. The utility services subject to tax include telecommunication services such as those provided by taxpayer.

Nonetheless, taxpayer has provided sufficient information to establish that the "late payment" fees received from its customers are not subject to the URT because the particular fees at issue were not received "in consideration for the retail sale of utility services...." This determination is consistent with the Department's stance as set out in LOF 40-20080417 issued October 15, 2008. The "late payment" fees included on taxpayer's URT filing for the September 30, 2005, return should be removed.

FINDING

Taxpayer's protest is sustained.

II. Underpayment Penalty.

DISCUSSION

Taxpayer asks that the Department abate the ten-percent penalty which was assessed because the Department concluded that taxpayer underpaid its estimated tax liability. Taxpayer makes this argument because it believes it had adequate grounds for originally determining URT Indiana tax liability as it did and because it believes that the penalty is entirely inapplicable.

The penalty to which taxpayer refers is specified under IC § 6-2.3-6-1 which states as follows:

(a) Except as provided in subsections (c) through (e), a taxpayer shall file utility receipts tax returns with, and

pay the taxpayer's utility receipts tax liability to, the department by the due date of the estimated return. A taxpayer who uses a taxable year that ends on December 31 shall file the taxpayer's estimated utility receipts tax returns and pay the tax to the department on or before April 20, June 20, September 20, and December 20 of the taxable year. If a taxpayer uses a taxable year which does not end on December 31, the due dates for filing estimated utility receipts tax returns and paying the tax are on or before the twentieth day of the fourth, sixth, ninth, and twelfth months of the taxpayer's taxable year.

(b) With each return filed, with each payment by cashier's check, certified check, or money order delivered in person or by overnight courier, and with each electronic funds transfer made, a taxpayer shall pay to the department twenty-five percent (25 [percent]) of the estimated or the exact amount of utility receipts tax that is due.

(c) If a taxpayer's estimated annual utility receipts tax liability does not exceed two thousand five hundred dollars (\$2,500) the taxpayer is not required to file an estimated utility receipts tax return.

(d) If the department determines that a taxpayer's:

(1) estimated quarterly utility receipts tax liability for the current year; or

(2) average estimated quarterly utility receipts tax liability for the preceding year;

exceeds five thousand dollars (\$5,000), the taxpayer shall pay the estimated utility receipts taxes due by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)) or by delivering in person or by overnight courier a payment by cashier's check, certified check, or money order to the department. The transfer or payment shall be made on or before the date the tax is due.

(e) If a taxpayer's utility receipts tax payment is made by electronic funds transfer, the taxpayer is not required to file an estimated utility receipts tax return.

(f) The penalty prescribed by [IC 6-8.1-10-2.1\(b\)](#) shall be assessed by the department on taxpayers failing to make payments as required in subsection (b) or (d). However, a penalty may not be assessed as to any estimated payments of utility receipts tax that equal or exceed:

(1) twenty percent (20 [percent]) of the final tax liability for the taxable year; or

(2) twenty-five percent (25 [percent]) of the final tax liability for the taxpayer's previous taxable year.

In addition, the penalty as to any underpayment of tax on an estimated return shall be assessed only on the difference between the actual amount paid by the taxpayer on the estimated return and twenty-five percent (25 [percent]) of the taxpayers's (sic) final utility receipts tax liability for the taxable year. (Emphasis added).

IC § 6-8.1-10-2.1(b) sets the amount of the penalty as ten percent.

Taxpayer was assessed a penalty because it purportedly underpaid its estimated tax liability. Taxpayer argues that the Department incorrectly determined that the underpayment penalty was even applicable.

As explained by its representative, "[Taxpayer's] position is that an estimated tax penalty does not apply if the taxpayer makes quarterly estimated tax payments equal to 25 [percent] of the liability on its tax returns as filed or makes payments sufficient to meet the safe harbor in Ind. Code § 6-2.3-6-1 (20 [percent] of the final liability or 25 [percent] of the prior year liability....)" (Emphasis added). According to taxpayer, "[I]t applied an overpayment from its utilities tax return for the September 30, 2006 taxable year as an estimate pay (sic) for the September 30, 2007, taxable year in the amount of \$66,250. It also made additional payments toward the 2007 tax liability in the form of an estimated payment of \$5,500 on March 20, 2007, and an extension payment of \$20,000 on January 15, 2008." As taxpayer calculated, its total utilities receipts tax payment for 2007 was \$91,750.

According to taxpayer, it paid \$91,750 in tax on a 2007 liability which it determined to be \$89,530. However, the Department found that taxpayer had not overpaid its 2006 liability and also assessed an additional 2007 liability of \$53,272 thereby – according to the Department – triggering the underpayment penalty because taxpayer's final liability was \$142,802.

In sum, taxpayer argues that the amount it paid fell with the "safe harbor" provision if one compares that amount it paid and the amount it calculated on its return. The Department's position is that taxpayer underpaid its tax because the amount it paid should be compared to the final amount due as determined on the audit report.

Taxpayer's argument is not entirely meritless. I.R.C. §§ 6654 and 6655 provide that the estimated tax for federal purposes is based on the amount listed on the return. In addition, courts have held that the federal estimated tax penalty is based on the originally-filed return rather than subsequently amended returns or returns which were adjusted by the I.R.S.

Nevertheless, based on a literal reading of IC § 6-2.3-6-1(f), Indiana law provides that the estimated (or underpayment) penalty is based on the "final" tax liability and "final" refers to the number that the Department determines is the correct amount of tax due rather than the amount reported by the taxpayer. Indiana's legislature has had an opportunity to incorporate the federal estimated tax provisions either explicitly – as it has done for individuals – or by mirroring the federal estimated tax penalty language. As set out in IC § 6-2.3-6-1(f), "final tax liability" should be afforded its ordinary meaning – the liability as finally determined by the Department – rather than implicitly incorporating the federal standard.

FINDING

Taxpayer's protest of the underpayment penalty is respectfully denied.

SUMMARY

The late payment penalties taxpayer receives from its customers are not subject to the URT. The estimated/underpayment penalty stands.

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